

No. 12183

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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GEORGE B. McCLYMAN, ELIZABETH SPENCER SAUERS,  
ELIZABETH BRAU and WILLIS N. URIE,

*Appellants,*

*vs.*

WILBERT C. HAMILTON,

*Appellee.*

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APPELLEE'S REPLY TO SUPPLEMENTAL  
BRIEF.

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## APPELLEE'S REPLY TO SUPPLEMENTAL BRIEF.

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### Statement.

The facts in this case have heretofore been presented to the Court, and we shall not attempt to repeat them.

### Argument.

Appellants, by the admission in the last sentence of their supplemental brief, make an extensive argument upon our part unnecessary. They say:

“The only issues at the trial of this matter was whether Wilbert C. Hamilton was a partner in the adjudicated bankrupt partnership and if so, whether he was insolvent.”

By the above they admit that there was an undetermined issue, and that the issue was whether appellee Hamilton was a partner of Brunson & Bunch.

Hamilton vigorously denied that he was a partner of Brunson & Bunch, or that he was personally liable to the petitioning creditors in any sum whatsoever. Therefore, the liability was not fixed as to him, and since it was not fixed as to appellee, petitioning creditors could not qualify as petitioning creditors under the provisions of Section 59-b of the Bankruptcy Act. Under this section of the Act, a petitioning creditor must not only have a claim which is liquidated as to amount, but it must be fixed as to liability against the person against whom the proceeding is directed.

Conceding, for the sake of argument, without admitting, that petitioning creditors here had claims fixed as to liability and liquidated as to amount against the partnership of Brunson & Bunch, still this would not be sufficient as against Hamilton.

It will be observed that in this bankruptcy proceeding it is sought to have Hamilton adjudicated both as a partner of Brunson & Bunch and individually. Appellants come into a court of bankruptcy and attempt to fix liability as to Hamilton without first having that liability fixed in a proper court action.

### 1938 Amendment.

Prior to the 1938 amendment of Section 59-b of the Bankruptcy Act, a creditor with a provable claim under Section 63 of the Act could qualify as a petitioning creditor in an involuntary bankruptcy proceeding whether such a claim was liquidated or not. In such proceedings much delay was caused in the determination of such issues (3 Collier on Bankruptcy, 14th Edition, page 583) and as a matter of common knowledge, the bankruptcy courts became congested by reason of the fact that such issues, collateral to the principal issue, had to be determined. This situation resulted in the 1938 amendment to Section 59-b of the Bankruptcy Act requiring the claims of petitioning creditors to be fixed as to liability and liquidated as to amount.

*In re Beechwood*, 36 Fed. Supp. 140.

Counsel for appellant says:

“Appellants submit that there is no distinction in principle between their position as petitioning creditors herein, and the surety as petitioning creditor in the Beechwood case. The liability is fixed both under the bond in the Beechwood case, and the contracts between the partnership, and the investors, in the within action.”

A careful reading of the *Beechwood* case will disclose that there is a substantial difference.

Beechwood had misappropriated money of his employer. He was under bond, and his bonding company had become liable to Beechwood's employer under said bond. Before filing the involuntary petition in bankruptcy, the bonding company had purchased the claim of Beechwood's em-

ployer, and there was a fixed liability both by reason of the embezzlement and the contractual liability under the bond.

Furthermore, the Court, in the *Beechwood* case, points out that it was passing upon a motion which was in the nature of a demurrer, and where no answer had been filed which raised an issue as to liability or the amount of the claim, and the Court concludes by saying:

“Here the taking is expressed in a fixed amount of money. On a motion to dismiss we cannot take cognizance of the fact that the alleged bankrupt may have defenses to the whole or part of petitioner’s claim. This is a matter that can be determined only after issue is raised by answer. Confined to the petition as we are, we believe the petitioning creditor has a claim fixed as to liability and liquidated as to amount.”

In the case here at issue, Hamilton had filed his answer denying that he was a partner of Brunson & Bunch, or that he was indebted to the petitioning creditors in any sum. Not only that, but the trial court heard evidence upon these issues, and determined them adversely to petitioning creditors. The fact that the claims of petitioning creditors were not fixed as to liability and liquidated as to amount is evidenced by the fact that counsel for appellants announced to this Honorable Court, at the time of oral argument on December 8, 1949, that he had subsequently been attempting to liquidate these claims as against Hamilton in a state court action.

We cited the cases of *In re Garrett & Co.*, 134 F. 2d 227 and *In re Central Ill. Oil & Refining Co.*, 133 F. 2d 657 in our reply brief herein, and further comment thereon is unnecessary.

### Findings of Trial Court.

The Trial Court found that Hamilton was not a partner of Brunson & Bunch. [Finding No. 2, p. 78, Transcript of Record.]

The Trial Court found that petitioners were not creditors of Hamilton. [Finding No. 2-d, p. 79, Transcript of Record.]

The Trial Court found that petitioners did not have claims fixed as to liability or liquidated as to amount against Hamilton. [Finding No. 2-o, p. 82, Transcript of Record.]

In the oral argument before this Honorable Court on December 8, 1949, the question arose as to whether or not the last mentioned finding contradicted the finding to the effect that petitioners were not creditors of Hamilton. We have examined these findings quite carefully since said date and do not feel that there is a contradiction. Certainly if the petitioners in the involuntary proceeding were not creditors of Hamilton, then they could not have claims fixed as to liability or liquidated as to amount against him. Under the law, these petitioners not only had to be creditors of Hamilton, but it was necessary for them to have claims against him, fixed as to liability and liquidated as to amount and both the findings in paragraphs 2-d and 2-o were proper and necessary findings.

It is obvious that the petitioners in this involuntary proceeding did not qualify under the provisions of Section 59-b of the Bankruptcy Act.

Respectfully submitted,

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